

The Professional Responsibility of Delivering  
Legal Services through Technology

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Developments in the practice of law and delivery of legal services are rarely synchronized with the governance of those developments. This is particularly true when lawyers and legal services offices adopt the use of technology within their practice settings. Over the past decade, cyberspace has come to play a major role in the delivery of legal services, but states that regulate practice have not always kept pace. This paper examines many of the issues that arise from the legal profession's efforts to govern the delivery of legal services through technology, with an emphasis on legal aid and pro bono.

#### I. Cyberspace is treated like any other place, mostly

Instead of quickly changing their rules when the use of the Internet became widespread in the mid-1990s, the legal profession generally came to the conclusion that the rules and laws in existence applied to any use of technology, even though those rules were not promulgated with an understanding of the workings and capacities of the technology.

In some instances, this application of pre-existing rules has not been a good fit. This is particular true of lawyers who want to use technology to promote their services in the marketplace. For example, an ethics opinion in Iowa concluded that lawyers who wanted to market their services on a multi-state basis might choose to have two web sites; one that complies with the Iowa ethics rules and one that complies with the rules of the other states. An ethics opinion from Hawaii concluded that lawyers could not email solicitations for business because the rule required any direct mail solicitations to be sent only by first class mail.

Nevertheless, the notion that the existing rules applied to the use of technology was pervasively embraced both within the opinions that govern client development and those that address delivery models. For example, New York Opinion 709 (Sept. 1998) states that using the Internet to practice law is "analogous to conducting a law practice by telephone or facsimile machine." The opinion concludes that the "obligations of traditional client representation would inhere in this practice as well." See, Lancot, Attorney-Client Relationships In Cyberspace: The Peril and the Promise, 49 Duke L.J. 47.

So, in many circumstances communications through email and the Internet are no different than through more traditional means.

#### II. When do we form an attorney-client relationship?

When determining the ethical propriety of communicating with individuals through technology, it is essential to have a clear understanding of whether or not an attorney-client relationship is formed. When it is, all of the rules of professional responsibility for the jurisdiction apply. When it is not, the great majority of those rules do not apply. Another way of looking at it is whether those providing legal services want the recipients of those services to have all of the protections given to law firm clients or, on the other hand, whether they can be appropriately served without those protections.

One of the problems with trying to establish clarity, however, is that the existence of the attorney-client relationship is in the eye of the beholder. The fundamental test of the existence of the relationship is whether the recipient of the services believes there is the relationship and whether, considering all of the circumstances, that belief is reasonable.

Sometimes a delivery model works best if it operates without establishing an attorney-client relationship. There are some tests that help make a determination of whether the relationship exists:

- Would you provide the same services to opposing parties, tell them you have done so?
- Can the service you provide not be the unauthorized practice of law if it is provided by someone who is not a lawyer?
- Are you providing only legal information and not legal advice? Within this dichotomy, legal information is usually deemed to be that which is general information, such as that which can be found in a book, while legal advice is that which is fact-specific. Richard Zorza has created a standard to govern the dichotomy by asking whether two lawyers can give two different answers to the same question and neither is committing malpractice. If so, it is legal advice. If they are unable to do so, and there is a single (factual) reply, it is legal information.

Disclaimers also have an important place when a delivery mechanism seeks to avoid the establishment of an attorney-client relationship. Since the individual's belief that the relationship exists must be a reasonable one, clearly informing the individual the services do not arise to the level of a relationship should negate a claim that they do. However, the services need to be limited as well. This is why the information-advice dichotomy is important.

### III. Is it information or is it advice?

Legal information is not fact-specific. Courts that have established facilitators have given some direction on what is appropriate legal information. Some of these that are relevant to the use of technology include:

- Information contained in a docket report, case file, index or other report
- Questions about court rules, procedures and practices
- Examples of forms or pleadings

- Questions about the completion of forms
- Questions concerning deadlines and due dates
- The status of a specific case
- Scheduling information
- Provide information about pro bono, legal aid and lawyer referral
- Provide definitions of legal terminology
- Provide legal citations, local rules and administrative orders
- Provide information about mediation
- Provide information about community services

On the other hand, services that are deemed to be legal advice include:

- Advising litigants whether to take a particular course of action, e.g. “Should I...” or “What should I do?”
- Take sides in a case or proceeding pending before the court
- Provide information to one party that you would be unwilling to provide to all other parties
- Give advice about whether to file a case
- Fill out a form or tell the litigant the words to fill in
- Recommend specific people against whom to file
- Recommend specific types of claims or arguments to assert
- Recommend types of damages to seek
- Recommend questions to ask witnesses
- Recommend techniques for presenting evidence
- Recommend objections to raise
- Recommend when or whether to request a continuance
- Recommend whether to settle a dispute
- Recommend whether to appeal a judgment
- Tell the litigant what to say in court
- Provide interpretation of legal terminology, statutes, rules order or cases

This list does not mean that a person cannot receive these services. It merely suggests that when a service provider does so, it is providing legal advice and is therefore more likely practicing law and incurring the obligation to comply with the rules of professional responsibility.

Whether or not the use of technology is fact-specific is discussed below under the topic of the unauthorized practice of law.

#### IV. If the rules apply, what does that mean?

While noting that legal services and pro bono providers must comply with all of their state rules when delivering services that are encompassed within the practice of law, this paper focuses on those rules that are most significant in the delivery of legal services through technology.

### A. Limited scope of representation

In 2002, the ABA amended Model Rule 1.2(c) to clarify that lawyers may unbundle their services. The rule states: “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” This rule, which is beginning to be adopted by the states, clarifies that lawyers and clients have the right to agree to a limited scope of representation, such as brief advice, form preparation and representation in court for a portion of a case. However, the client must understand the limitations and must agree to them.

So, for example, when a service provider offers a system that enables clients to pose fact-specific questions or to prepare forms online, and does so under the belief and understanding that the client and provider have an attorney-client relationship, the client and provider have a right to agree that the provider will give no other services, but the provider must make that clear to the client at the beginning of providing that service.

### B. Confidentiality

Except under narrow circumstances, a lawyer is not permitted to reveal information about a representation. Somewhat like the issue of the attorney-client relationship, confidentiality is in the hands of the client, who may give informed consent to release information. Therefore, types of technology that involve client interfaces must be used cautiously. Client should understand that if they use intermediaries, such as librarians or caseworkers, to assist with access to technological information, their confidentiality may be breached.

While it is unlikely that web sites involving legal services will be hacked, the potential exists and reasonable measures should be taken to prevent it. A more likely breach may be with the use of email. A series of focus groups conducted as part of the Access to Justice Technology Bill of Rights initiative examined issues involved with technologically disenfranchised populations, such as migrant workers and prisoners. The research also looked at victims of domestic violence. Unlike the other populations, they were more likely to have access to computers, but those computers were shared with other members of the household, including the abusers. While it may be more of a pragmatic issue than one of ethical compliance, the exchange of emails should be done in ways that protect the client. One possibility is the use of encryption.

In 1999, the ABA issued Formal Opinion 99-413, which did not require emails with clients to be encrypted. But it stated, “When the lawyer reasonably believes that confidential client information being transmitted is so highly sensitive that extraordinary measures to protect the transmission are warranted, the lawyer should consult the client as to whether another mode of transmission, such as special messenger delivery, is warranted.”

### C. Conflicts of Interest

One of the benefits of a delivery mechanism that establishes the attorney-client relationship, and invokes an application of the rules, is the fidelity to the client that results. This fidelity is guarded through the obligation of the lawyer to avoid conflicts of interest. When a lawyer obtains information from one client that could be detrimental to another client, the lawyer's responsibility is obviously compromised. Therefore, lawyers are required to check for and avoid conflicts. Furthermore, a lawyer in a firm must avoid conflicts with all of the clients represented by the firm. A legal services office is generally defined or deemed to be a law firm for the purpose of applying the rules.

In 2002, the ABA adopted a new model rule designed to ease the severity of conflicts and imputed conflicts in those matters where harm to a client is remote and public service is advanced. Model Rule 6.5 excuses lawyers from checking conflicts when there is no expectation of a continuing representation and the lawyer is working in a non-profit or court-annexed setting. If the lawyer knows of a conflict, he or she must act accordingly and not further any representation, but the lawyer is excused from the burden of checking for conflicts if he or she does not have any actual knowledge of a conflict.

#### D. Candor toward the tribunal

An issue that has been troublesome to some courts with pro se litigants, and may be aggravated by the use of technology to generate court forms, is candor toward the tribunal. Some judges believe that it serves justice for them to be lenient in the application of rules of evidence and procedure to pro se litigants, but when those litigants have the advantage of a lawyer behind the scenes, the litigant is taking advantage of the court's good graces. As a result, some states require lawyers who prepare forms for pro se litigants to disclose their names and contact information. It is unclear whether the same objection would apply to the situation where the forms are prepared electronically.

#### V. The unauthorized practice of law

While the ethics applicable to the use of technology rely on analogies to methods of providing the same services without the technology, some delivery methods do not neatly fit into this model of analysis. The use of technology to generate legal documents has been deemed the unauthorized practice of law at least twice since 1999. The first case involved suits filed by the Texas Unauthorized Practice of Law Committee against Parsons Technology and Nolo Press, both of which manufactured software that enabled users to create legal documents, such as wills. In the scrutiny of Quicken Family Lawyer, an over-the-counter software enabling the user to complete over 100 forms, the court found that the software went through an intake process, analyzed the information and tailored the forms to the fact-specific circumstances of the users. The court concluded that there was no need to have a specific client and the method of the software operated in violation of the statute governing unauthorized practice. The court granted summary judgment to the committee. The case became moot when the Texas legislature passed a law amending the definition of UPL, creating an exception to web sites and software that clearly and conspicuously state that the product is not a substitute for the advice of an attorney.

The second case is more recent. In *In re Reynoso*, the appellate panel of the Ninth Circuit Bankruptcy Court held that the software providers were bankruptcy preparation providers and engaged in the unauthorized practice of law. Quoting the lower bankruptcy court's opinion, the court stated, "Websites don't just grow out of thin air and aren't maintained out of thin air. They're put together by people; they're put on the Internet; and it's not the web site that provides the assistance. It's the people who develop the web site that provide the assistance." The court then applied the California definition of the practice of law and concluded that the web site producers were doing so and therefore in violation of the unauthorized practice of law.

The impact of these findings are not obstacles for legal services offices that use technology for intake and form preparation, but they do reinforce the assumption that the use of these mechanisms are the practice of law and require compliance with the rules of professional conduct.